LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
DEC 18 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

TERM, 19

No. 73-944

PELZER REALTY COMPANY, INC., AND
WILLIAM G. THAMES,

PETITIONERS,

VERSUS

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JAMES W. GARRETT
Rushton, Stakely, Johnston
& Garrett
P. O. Box 270
Montgomery, Alabama 36101

Attorney for Petitioners

December, 1973.

INDEX

	Page
Opinions Below	2
Jurisdiction	2
Points to be Considered	2
Constitutional Provision and Statutes Involved	3
Statement of the Case	3
Statement of the Facts	4
Argument	8
Conclusion	20
Certificate of Service	21
Appendix A—Opinion of the Court dated September 5, 1973	A-1
Appendix B—Opinion of the Court dated November 19, 1973	B-1
Appendix C—Affidavit of William G. Thames filed with Court of Appeals in application for rehearing	C-1
Appendix D—Order staying mandate below dated December 11, 1973	D-1

CITATIONS

Cases: Page

Alabama Mills v. Carnley,
44 So. 2d 622, 35 Ala. App. 46,
14 ALR 2d 1301 11

Bettis v. Taylor,
8 Port. 564 11

Cook v. Meyer,
73 Ala. 580 11

Crowder v. Fletcher,
80 Ala. 219 11

Fuller v. State,
60 So. 2d 202, 257 Ala. 502 11

Gilbert v. Talladega Hardware Co.,
70 So. 660, 195 Ala. 474 11

Grantland v. State,
62 So. 470, 8 Ala. App. 319 11

Griffin v. Fowler,
81 So. 426, 17 Ala. App. 44 11

Gunter v. Leckey,
30 Ala. 591 11

Holmes v. Lambert,
50 So. 140, 163 Ala. 460 11

Home Ins. Co. v. Cobbs,
103 So. 165, 20 Ala. App. 491 11

Jacobs v. State,
85 So. 837, 17 Ala. App. 396 11

Jones v. Mayer,
392 U. S. 409, 20 L.Ed. 2d 1189 ..... 2, 10

Knowles v. State,
98 So. 207, 19 Ala. App. 476 11

Lamar v. Rivers,
178 So. 16, 235 Ala. 130 11

Page

McDonnell v. Murnan Shipbuilding Corp.,
98 So. 887, 210 Ala. 611 11

Southern Railway Co. v. U. S.,
88 F. 2d 31 11

State v. Almon and One Black Horse Mule, 92 So. 548, 207 Ala. 277 11

Troy State University v. Dickey,
402 F. 2d 515 ..... 2, 8

Westenhaver v. Dunnavant,
143 So. 823, 225 Ala. 400 11

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

42 U. S. C. 3601, et seq., Fair Housing Act 2, 3, 6, 7, 8, 10, 12

IN THE

Supreme Court of the United States

TERM, 19

No. .....

PELZER REALTY COMPANY, INC., AND
WILLIAM G. THAMES,
PETITIONERS,

VERSUS

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners, Pelzer Realty Company, Inc. and William G. Thames, respectfully pray that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit rendered on the 5th day of September, 1973.

Application for rehearing was made to the Fifth Circuit Court of Appeals and was denied on November 19, 1973.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit appears in Appendix A.

The opinion denying petition for rehearing appears in Appendix B.

The order staying mandate appears in Appendix D.

JURISDICTION

This Court has jurisdiction and authority to review the decision of the United States Court of Appeals for the Fifth Circuit by authority of 28 U. S. C. A., Section 1254 (1) and Supreme Court Rule 19.

POINTS TO BE CONSIDERED

1. Where there is nothing left to decide the controversy is moot.

   Troy State University and Board of Trustees, Troy State University, Appellant, v. Gary Clinton Dickey, Appellee, 402 F. 2d 515.

2. Under 42 U. S. C. 3601, et seq., discrimination solely because of race is illegal.

   Joseph Lee Jones, et ux., Petitioners, v. Alfred H. Mayer Co., et al, 392 U. S. 409, 20 L. Ed. 2d 1189.

3. The charging of closing costs in real estate sales is legal.

4. The salesman's letters selected by the govern-

ment do not show racial discrimination outlawed under the Housing Act.

5. Before a suit is brought against a citizen, under 42 U. S. C. 3601, et seq., reconciliation and compromise should be tried to avoid litigation, if possible.

42 U. S. C. 3601, et seq.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

I

Fair Housing Act, 42 U. S. C. 3601, et seq.

STATEMENT OF THE CASE

The Government filed, in the name of the United States, a petition against the two defendants, alleging that the defendants pursued a policy and practice of discrimination by (1) refusing to sell homes to black persons and by (2) discriminating against black persons in the terms and conditions of the purchase of a dwelling. Furthermore, the United States alleged that "[t]he denial to black persons of the right to equal opportunity in housing described in this complaint raises an issue of general public importance." The United States sought to enjoin the defendants from (1) "discriminating against any person in relation to the sale of a dwelling on account of race, color, religion, or national origin; and (2) failing or refusing to take all necessary and appropriate affirmative steps to correct the continuing effects of its discriminatory practices."

The Court below decided the case in favor of the defendants, whereupon, the United States appealed to the United States Court of Appeals for the Fifth Circuit in New Orleans, and its decision, No. 72-1609, dated September 5, 1973, was rendered reversing the lower court, and application for rehearing filed by the defendants was denied on November 19, 1973.

STATEMENT OF THE FACTS

Petitioner William G. Thames was at the time of the alleged discrimination building twelve houses in the Seth Johnson Estates in Montgomery, Alabama. Petitioner Pelzer Realty Company, Inc., a wholly-owned corporation of Thames, was doing the selling of said houses. Two blacks, both connected with Alabama State College in Montgomery—one of them in the President's office—came to the salesman and expressed an interest in two of the houses. The salesman took them to see Mr. Thames the next day. The meeting was friendly and cordial from all sides. Mr. Thames expressed the feeling that he would have to sell the houses but that a sale to them might prevent his selling the other ten to anyone for a long period of time. The blacks stated that they understood his position and would sell the other ten houses. This proposition was eagerly accepted by Mr. Thames and he told them that he would put Mr. Flanagan, the salesman, at their disposal. He also told them, after they had expressed a willingness to sell the other ten houses, that he would give them the closing costs. So far as the record reveals, no closing costs had ever been given by Thames to anyone in Seth Johnson Estates before this instance. Two weeks went by and the two blacks

either didn't or couldn't produce. One of the proposed purchasers had been turned down by the VA. Mr. Thames, with Mr. Flanagan, went to see Mr. Barnett, who seemed to be in charge of the matter, and he told them that they had not been able to sell the houses, whereupon, Mr. Thames stated to Mr. Barnett that if they just wanted to purchase the four houses they could get them but they would have to put up a $500.00 binder to let him know they were sold, which would be returned at closing, and that they would have to pay the closing costs. This was agreed upon. During the next five or six days Mr. Thames heard that Barnett had signed a contract with Lowder Realty Company to purchase a house in an all white neighborhood on the same evening he talked to him and that the next day he called and repudiated the contract. He was supposed to have earnest money for the binder by the next day.

Mr. Thames then became convinced that the two blacks had held up his operation for nearly a month while interest was running, and no sales effected simply to test him, and he sent Flanagan out to return the checks and put Sold signs in front of the houses.

Mr. Thames then received a letter from a Birmingham attorney representing Barnett, who was from Springfield, Massachusetts, now connected with the College, and when Mr. Thames did not do anything about the matter, he received a telephone call from Barnett in which Barnett stated to him, according to Thames, that the matter could be handled without the houses. Mr. Thames interpreted this to mean that Mr. Barnett wanted money. Mr. Barnett admitted making the call, admitted he did not tell his close

friend, Marshall, who was purchasing a house with him, about the call, nor did he tell anyone about it. Mr. Barnett said that the secret telephone call to Thames—just slipped his mind when he talked to the Government investigator. He testified on deposition that he did not remember the name of the street where he attempted to purchase the house, and did not remember the name of the real estate company, although the record shows that he called the company the next day and repudiated his contract.

The Government investigator, after hearing the deposition, continued to prosecute the case. Suit was filed against Thames and Pelzer Realty Company, without ever even checking the facts with him. This suit was filed nearly a year after the alleged discrimination. Thames was not given any opportunity to state what the facts were, no opportunity for reconciliation or compromise as provided by the Act, and no proof was presented at the hearing that the blacks could have passed the VA loan requirements, except by way of Flanagan's opinion. One of the blacks submitted by Flanagan had been turned down by the VA. No proof was made to the Court that any other realtor in Montgomery had discriminated in any other way and no proof was made that there was a pattern of practice in Montgomery to deny blacks houses under the Fair Housing Act. The record showed that the two blacks had at the time of trial purchased lower priced houses in mixed districts. The briefs in the Court of Appeals stated that Pelzer Realty Company, Inc. had its customers checked in such a way that it had ceased to do business. At the time of the decision by the Court of Appeals, the matter was moot.

The record shows on Page 275 that Thames on the second visit to see the blacks at the College offered to sell just houses wanted. This was not mentioned by the Court of Appeals. The blacks testified to this. This offer was made after the original offer of the blacks was accepted by Thames to sell the houses, and was made after they couldn't or wouldn't produce. The blacks both testified that they had never been turned down for houses in Montgomery, although one of them said he had been looking for about three years, and that none of their friends had ever been turned down in Montgomery. There was utterly no evidence of a pattern of practice in Montgomery outlawed by the Fair Housing Act. The Government went through every transaction of Pelzer Realty Company, Inc. and Mr. Thames since they had been in business, and found only that one instance which they criticized.

They also selected two letters which they alleged showed discrimination, one from a black sergeant inquiring about a house in the Carver School district. None was available in this district and he was so told. It was recommended that, due to the size of his family, he live on the post where he had formerly lived. This was a true statement, and the Government could not find to the contrary. Another letter selected was from a white major who wanted a house in a segregated area and they wrote him and told him they would show him houses. The Government says that this shows that they were enthusiastic when dealing with a white and were less enthusiastic when dealing with blacks, and that this is discriminatory under the Fair Housing Act.

We introduced a compilation showing about 200 contracts of sale where the purchaser had paid some or all of the closing costs. Some of these purchasers were black people. We introduced affidavits that closing costs were a matter for negotiation. In fact, it is admitted that the charging of closing costs for anything but racial reason is legal.

The testimony was that Thames was selling just the houses wanted and did not know whether he could sell the others. The record is silent as to whether he had ever built any other houses in Seth Johnson Estates, the charging of closing costs under these conditions was certainly reasonable for economic reasons.

ARGUMENT

I

The Petitioners respectfully request that this opinion be withdrawn and the matter be held moot. The Fifth Circuit Court, in the case of *Troy State University v. Dickey*, 402 F. 2d 515, held that the dispute was moot and refused to decide it, on facts very similar to the facts in our case.

Troy State, after Dickey violated instructions, permitted him to remain in school for the next semester but would not permit him to return the next year. An appeal was taken in the case by Troy State. Dickey instead of returning back to Troy enrolled at Auburn. The Fifth Circuit Court held that the situation was moot and that jurisdiction could not be conferred by agreement. We pointed out in our brief that Pelzer

Realty is out of business and the record shows that both blacks had bought houses before the trial, houses at greatly reduced prices. So, at the time of the hearing in the Fifth Circuit Court, no one could have been violating the law in the situation presented. See affidavit of William G. Thames filed with Court of Appeals with application for rehearing (Appendix C).

II

Thames was building twelve houses in Seth Johnson Estates and had a large sum of money borrowed for the construction of said houses. Two blacks wanted to buy two of the houses. They went to Thames and in telling them that they could make him sell the houses, he reviewed what was going to happen to him when he sold just two of the twelve. That he was going to have to hold some of them indefinitely. Whereupon, one of the blacks, Barnett, stated that they would sell all of the houses within a short time. Thames eagerly accepted this proposition and made available to them his salesman, Mr. Flanagan. After two weeks had elapsed, Thames went to see Mr. Barnett to find out why the houses had not moved. Mr. Barnett stated that they were having trouble disposing of them, whereupon, Mr. Thames stated that if they wanted the houses selected, they could get them, but would have to pay the closing costs and put up a $500.00 binder on each to let him know that the houses were sold. This binder was to be returned at closing. This was agreed upon and the offer kept open for a period of about five or six days. During that time, Mr. Thames found out about Mr. Barnett's attempted purchase of a house

from Lowder Realty Company and his repudiation of the contract the next day. He became convinced that these blacks had simply held up his operation for nearly a month hoping that he would make a mistake and, not being a lawyer, he terminated the offers and put Sold signs in front of the houses.

The Court of Appeals has held that Thames' words had the effect of discriminating in the sale of the houses to these blacks. The opinion then goes on to say that where race is given any significance in a decision, that this violates the Fair Housing Act. They stated that the charging of closing costs violates the Fair Housing Act, and further, they state that where letters show an enthusiastic approach to whites and a less enthusiastic approach to blacks, that this constitutes a violation of the Fair Housing Act.

This very liberal construction of the housing act is at variance with the Supreme Court's interpretation of an old reconstruction statute. The Supreme Court said in *Jones v. Mayer,* 392 U. S. 409, 20 L. Ed. 2d 1189, of discrimination:

> ". . . That result, this Court concluded, was prohibited by § 1982. To suggest otherwise, the Court said, 'is to reject the plain meaning of language.' Ibid.
>
> "Hurd v. Hodge, supra, squarely held, therefore, that a Negro citizen who is denied the opportunity to purchase the home he wants *solely* because of race or color,' 334 U. S. at 34, 92 L. Ed. at 1194, has suffered the *kind* of *injury* that § 1982 was designed to prevent."

The familiar rule for interpretation of statutes is that, if they are penal in nature, they are strictly construed. *Bettis v. Taylor,* 8 Port. 564; *Holmes v. Lambert,* 50 So. 140, 163 Ala. 460; *State v. Almon and One Black Horse Mule,* 92 So. 548, 207 Ala. 277; *Grantland v. State,* 62 So. 470, 8 Ala. App. 319; *Jacobs v. State,* 85 So. 837, 17 Ala. App. 396; *Knowles v. State,* 98 So. 207, 19 Ala. App. 476; *Home Ins. Co. v. Cobbs,* 103 So. 165, 20 Ala. App. 491; *Southern Railway Co. v. U. S.,* 88 F. 2d 31; *Gunter v. Leckey,* 30 Ala. 591; *Westenhaver v. Dunnavant,* 143 So. 823, 225 Ala. 400; *Fuller v. State,* 60 So. 2d 202, 257 Ala. 502; *Alabama Mills v. Carnley,* 44 So. 2d 622, 35 Ala. App. 46, 14 ALR 2d 1301.

Also, if a statute is in derogation of common law, it is to be strictly construed. *Cook v. Meyer,* 73 Ala. 580; *Gilbert v. Talladega Hardware Co.,* 70 So. 660, 195 Ala. 474; *Lamar v. Rivers,* 178 So. 16, 235 Ala. 130; *Griffin v. Fowler,* 81 So. 426, 17 Ala. App. 44; *Crowder v. Fletcher,* 80 Ala. 219; *McDonnell v. Murnan Shipbuilding Corp.,* 98 So. 887, 210 Ala. 611; *Gunter v. Leckey,* supra.

The interpretation by the Fifth Circuit Court is different from the plain words of the statutes construed. The statutes outlaw discrimination, "*because of race*", 42 U. S. C. 3601, et seq.

The sections involved outlaw discrimination because of race. They do not outlaw bid intent based on race. It is the act that is outlawed. They do not outlaw discrimination partly based on race. They do not outlaw discrimination if a man goes on and performs regardless of his personal feelings. Under this

decision, he is guilty if race is given any significance in his otherwise legal decision. This, we respectfully submit, is an erroneous interpretation of the act.

It seems that the lower federal courts have been in competition with each other to see which court could put the wildest interpretation on the Fair Housing Act. One of them held that no intent to violate it is necessary. Another held that it does not have to be solely because of race. Now, the Court holds that if race is given any significance, whatever that means, the decision is illegal. The very loose and liberal interpretation of the act in the face of all rules of interpretation has given rise to half investigations and the filing of suits without using the conciliation and compromise provided for in the statute—convictions are almost automatic.

This investigation is a perfect example. Suit was filed against the defendants without so much as an interview with them. The suit was filed without getting from the blacks a complete statement of the facts, and the decision then came out in favor of the blacks and goes further than any decision in the past. It puts the Court in the position of having to put its stamp of approval on incomplete investigation and on filing of suits without using the procedure outlined in the statute.

It seems to us that it is time to declare what the law is and to have it apply with an equal hand to people who are black, yellow, green, blue and even white. The law is supposed to protect, as well as punish. It should be equally available to all men regardless of their color, and not just to those of a certain color.

The Court has given such a liberal construction to the act, that no realtor can ever deal with a black without laying himself open to suit. No matter what his motives, the black can haul him into court and claim that he had race in his mind to some extent when he made an otherwise legal decision and the blacks presumably would prevail.

Is a man obligated to do for a black man because he is black, more than the law otherwise requires him to do?

The Court erred in holding Thames violated the act where the record shows, according to the blacks themselves, that on the second visit to see them, Thames offered to sell them just the houses they wanted (R. p. 275).

If a man finally does what the law provides, is he responsible for not wanting to do it?

It is remarkable to me that the government persisted in litigation of this case after the full facts were developed by depositions.

The blacks admitted (R. p. 275) that Thames agreed to sell them the houses during his second visit. Thames then attempted to terminate the potential sales after he learned that one of the blacks had made a contract with no trouble with Lowder Realty Company, and then went back on it the next day. Thames is a layman, not a lawyer, and elected to terminate with these blacks in a clumsy manner, but it was all he knew.

We developed by deposition that Barnett is from

Springfield, Massachusetts, that he is now connected with the Alabama State Teachers College. That he had been looking at houses for some time, approximately three years, and had never been turned down. That he had bought a house and signed the contract for it on the same evening and then repudiated it. That he must have known his rights. It was shown in his depositions that he claimed he did not know the name of the street where he had bought the house. Obviously he wasn't telling the truth. He did not know the name of the real estate company, obviously not the truth as the record shows he called the next day and repudiated the contract.

Then, in the deposition, we developed that he had gone to an attorney and had him write Thames, presumably for a cash settlement. Then comes the astounding part of the transaction. Barnett called Thames some months after the letter from his attorney was received by Thames. In this telephone conversation, Barnett, according to Thames, wanted money and not houses. Thames declined to furnish money knowing he was not guilty of wrongdoing. Barnett admitted making the call, admitted he did not tell his friend, Marshall, about it or anyone else. He simply denies asking for money and gives the weak excuse for the call as one to ask about the availability of the houses.

Barnett's action in making this secret call was completely unnatural, he didn't tell his close friend, Marshall, about it (R. pp. 301, 304, 306). He made it after contact by the lawyer with Thames. He, according to Thames, tried to shake Thames down. He

says he didn't tell the Government investigator about this secret call to Thames; he said it just slipped his mind.

The Government has continued with this case in the light of these facts elicited by deposition. It is obvious that salient and important facts were kept from the investigator. Suit was filed against Thames without ever checking the facts with him and without even advising him that suit was being contemplated until fifteen minutes before the Marshal appeared.

Now, the Fifth Circuit Court, as well as this Honorable Court, is requested to put a stamp of approval on this type of conduct by Barnett. This is due to the confusion growing out of the construction of the Fair Housing Act to mean something different from what it actually says.

Barnett's actions before and after the termination are consistent with a plan to shake Thames down and not to buy houses. When Barnett and Marshall later bought houses, they bought much cheaper houses. The entire action on reading this file shows that they really did not want to buy.

There is no duty on the realtor to keep an offer open indefinitely while people with no or practically no investment have his entire operation held up hoping that he will make the wrong move.

III

The Court erred in holding that Thames' charging of closing costs amounts to discrimination. The charging of closing costs is admittedly legal. Every contract

since Pelzer had been in business was checked by the Government in an attempt to find some violation by Thames. We produced some 200 contracts where the buyers had paid some or all of the closing costs. I am sure that some of these are blacks. The Court will note that in the market at Tuskegee, Alabama, some of the blacks paid closing costs and some of them did not. According to the record at the time of the attempted purchase by these blacks, no closing costs had been given to anyone by Thames in Seth Johnson Estates, but even if he had given closing costs, he had a right to collect closing costs. If a realtor has ever given closing costs to a white, is he obligated to give closing costs to all blacks forever?

Thames was offering to sell just the houses wanted to blacks knowing the other houses would sit there indefinitely and knowing that this would bankrupt him. It certainly appears reasonable to include closing costs especially when the blacks were making no down payment, and the charging of closing costs was admittedly legal and proper on an economic basis.

The position the Government argues for is that Thames having given some closing costs in the past to some whites, was under a legal duty to give closing costs to blacks from then on. There was nothing racial in charging these closing costs.

IV

The Court has erred in upholding the utterly ridiculous position of the Justice Department in regard to sales approach. The Justice Department went through extensive and detailed examination of all Pelzer Realty

Company records and they selected two letters which they claimed showed that Thames' salesmen were enthusiastic while dealing with whites, and showed less enthusiasm while dealing with blacks. One of the letters was from a black sergeant who stated that he wanted a house in the Carver School district. It so happened Thames did not have any houses in this school district at the time. The salesman replied that they had no houses in this school district. This black asked for a house in a specific area and was told that Thames did not have one. This was *true,* and the Government could not find otherwise in checking the records.

The next letter was from a white army officer who asked for a house in a segregated area. They had none in such a district, but agreed to show him houses. We respectfully submit that a reading of these letters fails to show racial discrimination, outlawed by the Civil Rights Act. Thames probably could have had his salesmen use a form letter, but this would not have answered the specific questions.

The Justice Department desired a Court ruling on this point, and if, under the weak facts of this case, discrimination has been shown, then we respectfully submit that it could be shown in every single case the Justice Department chooses to bring.

This decision fixes it so that the Justice Department can take any citizen its investigator does not like to court and have him incur attorney's fees and convict 100% of those selected regardless of the facts. A question can always be made as to whether the salesmen approached a black with the right amount of en-

thusiasm. Different salesmen have different approaches, different temperaments. Some of them won't take a potential customer to see houses that they think he can't buy. If the Court seeks to regulate the approach of salesmen, then the lid is off and all cases will result in convictions regardless of the facts, all the black man will have to do is say that he doesn't think the salesman showed the proper enthusiasm when he dealt with him, a completely ridiculous statement.

V

The Court erred in holding that the government need not show a pattern or practice in the community to discriminate to allow the Attorney General to bring and maintain an action under the statute.

There is not one scrap of evidence which shows there was in existence in the Montgomery area a pattern or practice condemned by the act; on the other hand, the record affirmatively shows by the testimony of the blacks themselves, that they have never been turned down for houses in Montgomery and none of their friends had been turned down. The record affirmatively showed that there was utterly no pattern or practice, in the instant case. The dealing was had by one realtor with two blacks at the same time. The Government examined every transaction of the real estate company since it went into business, and they found only the one situation which they claim constitutes discrimination. They did everything that men and money can do to find some act of discrimination and yet all that they came upon was the claim of Barnett and Marshall. They remained in the case, pursuing it

against a citizen and his business, after it was shown that at least one of the black persons had been less than truthful. No other violation by any other realtor in Montgomery was shown to prove a pattern or practice. No proof was adduced that Thames or Pelzer had discriminated against any other blacks.

The Court erred in approving the filing of suit by the Attorney General without first going through any conciliatory procedures authorized by the act. The Justice Department in this case filed suit without so much as contacting Thames to find out his side of this controversy. The investigator took the words as gospel truth of the two blacks, and filed suit on their word alone. We have shown what Barnett did say. We respectfully state that if any inquiry had been made to Thames in advance stating to him that you have violated the Civil Rights Act in the sale of these houses, he would have immediately agreed to stop what he was doing if it violated the act, he would have agreed to do anything reasonable and not to do anything in the future that would violate the law. Instead, the Government was anxious to get a case against a Montgomery citizen. If this decision stands, Thames finds himself with his real estate company gone, having large attorney fees incurred and finds himself in the position of having to plead guilty to failing to sell the houses to blacks because of race when this was not true, and then is faced with the prospect of pleading guilty to past violations of which no proof had been made. The Court says that if he does this, the District Judge might be easy on him and use conciliation and compromise to frame a decree. If this position had been adopted by the Government investigator in the first

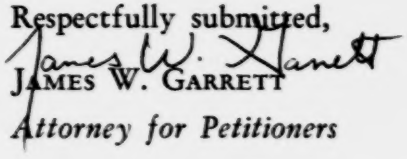
instance as the act provides, this suit would have been completely unnecessary.

It is particularly galling to a man who, after one of the particular blacks has sought to shake him down, thus confirming his belief that the black had held up the sale on his houses for practically one month, never intended to purchase houses. He was so careful in his answers to questions that he stated that he did not know if he had ever discriminated in the past. He couldn't think of an instance where he had. Certainly the Government could not find one, yet this Court in its decision used this against him. He now must confess or be found guilty to violating the housing act and violating it in the past. He must make some kind of amends for past violations he never committed and for aught appearing never occurred.

CONCLUSION

Petitioners submit that this case should be reversed on the basis of the reasons hereinabove set out.

Respectfully submitted,



JAMES W. GARRETT
Attorney for Petitioners

Of Counsel:

RUSHTON, STAKELY, JOHNSTON & GARRETT
Post Office Box 270
Montgomery, Alabama 36101

December, 1973

CERTIFICATE OF SERVICE

I hereby certify that I have served copies of the foregoing Petition for Writ of Certiorari upon the following attorneys for Respondents, by depositing the same in the United States Mail, postage prepaid, directed to their respective addresses, on this the 18 day of December, 1973.

IRA DEMENT
United States Attorney
Federal Building
Montgomery, Alabama 36101

FRANK E. SCHWELB AND
NORMAN P. GOLDBERG
Attorneys
United States Department of Justice
Washington, D. C. 20530

James W. Hamilton
Of Counsel for Petitioner

APPENDIX

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 72-1609

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

versus

PELZER REALTY COMPANY, INC., and WILLIAM G. THAMES,
Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Alabama

---

(September 5, 1973)

Before COLEMAN, MORGAN and RONEY, Circuit Judges.

MORGAN, Circuit Judge: In a civil action, the United States charged the Pelzer Realty Company, Inc., and its president, William G. Thames, with violating Title VIII of the Civil Rights Act of 1968, 42 U. S. C. §§3601 *et seq.* (the Fair Housing Act).[1]

---

[1] 42 U. S. C. §3604 provides in pertinent part:
As made applicable by section 3603 of this title

The complaint alleged that the defendants refused to sell homes to black people and discriminated against them in the terms and conditions of the purchase of dwellings. Jurisdiction was asserted under 42 U. S. C. §3613 and 28 U. S. C. §1345[2]

---

and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful —

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, or national origin.

(b) To discriminate against any person in the terms, conditions, or provisions of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, or national orign.

[2] 28 U. S. C. §1345 provides:

Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.

42 U. S. C. §3613 provides:

Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by this subchapter, or that any group of persons has been denied any of the rights granted by this subchapter and such denial raises an issue of general public importance, he may bring a civil action in any appropriate United States district court by filing with it a complaint setting forth the facts and requesting such preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order against the person or persons responsible for such pattern or practice

The district court decided the case on the pleadings, affidavits, stipulations and depositions.[3] It found that no discrimination was shown, denied relief and dismissed the complaint. We reverse.

I

The Complaint

In its complaint the United States alleged that the defendants pursued a policy and practice of discrimination by (1) refusing to sell homes to black persons and by (2) discriminating against black persons in the terms and conditions of the purchase of a dwelling. Furthermore, the United States alleged that "[t]he denial to black persons of the right to equal opportunity in housing described in this complaint raises an issue of general public importance." The United States sought to enjoin the defendants from (1) "discriminating against any person in relation to the sale of a dwelling on account of race, color, religion, or national origin; and (2) failing or refusing to take all necessary and appropriate affirmative steps to correct the continuing effects of its discriminatory practices."

II

Facts of the Case

A. Barnett & Marshall.

The complaint is based primarily on the defendants' treatment of two black men, Nexton Marshall, Jr. and

---

or denial of rights, as he deems necessary to insure the full enjoyment of the rights granted by this subchapter.

[3] The district court in its pretrial order permitted the case to be so submitted. Rule 16, Fed. R. Civ. P.

Arthur Barnett. On May 20, 1970, Marshall, assistant to the president of Alabama State University, saw a Pelzer Realty Co. advertisement for homes in Seth Johnson Estates, in Montgomery, Alabama. He then called his friend, Barnett, head of the placement office at Alabama State, who was also interested in buying a house. Marshall arranged for his wife, Barnett and Barnett's wife to meet a Pelzer agent, Charles Flanagan, at Seth Johnson Estates to look at the homes. After that meeting, the Barnetts and the Marshalls decided they wanted to buy houses from Pelzer in Seth Johnson Estates.

The next day Marshall and Barnett met with Flanagan and defendant Thames at the Pelzer Realty offices in Montgomery. At that meeting, Thames told Marshall and Barnett that if he sold two of his 12 vacant houses in Seth Johnson Estates to them he would have a hard time selling the rest of the houses. Thames also offered to build identical houses for the two men at the same price in another part of town. (Thames' lawyer later suggested to a lawyer representing Barnett and Marshall that Thames was willing to build identical homes for the men at the same price "in any black neighborhood.") At the same meeting Thames told the men they could probably force him to sell them the houses by suing him, but that he could tie the case up in court for so long they would no longer want the houses.

It was then agreed (at Marshall and Barnett's suggestion) that the two men would try to find other purchasers. Thames told them that if they found seven other purchasers he would not charge them closing

costs[4] and that if they could not find the other purchasers they would have to pay closing costs.

Between May 21 and June 5 Barnett and Marshall tendered token binder checks to Pelzer and signed purchase contract forms (offers to buy). These forms were never signed by Thames, so a contract was never formed.

By June 5, 1970, buyers for the other houses had not been found, and Thames told the two men that unless they found the additional buyers they would have to pay the closing costs on their homes. Thames also said that he wanted a $500 binder from each of them. These additional binders were never paid.

About June 10, Thames told Flanagan that he had found that Barnett had once dishonored a purchase agreement with another realtor, and that he (Thames) thought the two men were just testing the market. He instructed Flanagan to tell the two men that the houses had been sold, withdraw the offers and return the token binders. Thames also, as the district court found, entered into fictitious contracts to sell the houses in which Barnett and Marshall were interested. The district court found that this sham was for the purpose of foreclosing the right of Barnett and Marshall to recontract for the houses.

B. Closing Costs.

The second phase of the government's case against the defendants consists of evidence that Pelzer as a general practice charged closing costs to black buyers

[4] The exact number is disputed.

but not to white buyers. All of Pelzer's Montgomery customers were white, and all its Tuskegee customers were black. It also found that although white buyers in Montgomery usually paid no closing costs and black buyers in Tuskegee always did, this practice was caused by variations in the geographical markets and not by racial discrimination.

C. Letters.

Finally, the government introduced into evidence several letters sent out by Pelzer to prospective customers and argued that the letters Pelzer sent to customers who identified themselves as black were less enthusiastic and helpful than the letters sent to prospective purchasers who did not identify themselves as black. The court found no merit to this argument.

III

Violations of Title VIII

Although the district court found the facts in this case to be substantially similar to the above summary, it concluded that Barnett and Marshall had not been discriminated against because Thames never refused to sell them the houses. In fact, the court found that he specifically admitted that the law forced him to sell them the houses. But we conclude that Thames committed at least three violations of the Fair Housing Act.

A. Grudging acceptance of a customer can hardly be equated with the aggressive sales techniques used by Thames and his agents on other occasions. The court below found that, "Flanagan told Barnett that

because Seth Johnson was a white neighborhood, there might be problems with the sales. . . ." At the meeting the next day, the court found, "it was agreed that Thames had 12 vacant houses in Seth Johnson Estates and that, if he sold one or two of them to blacks, he would have a very difficult time selling the others. . . ." It was at this same meeting that Thames told the two men that they could force him to sell them the houses, but he might tie the case up in litigation for so long they wouldn't want the houses when it was over.

Thames violated §3604(a) when he offered to build identical houses for them in another part of town, and when he threatened to force them into litigation before selling the houses. (This is not to say that a person cannot indicate an intention to challenge a law he believes in good faith to be unconstitutional or otherwise invalid. But that was not what Thames had in mind, since he told Barnett and Marshall they would probably win by suit.) By these statements, Thames and Flanagan let the two men know that they were not particularly welcome as customers, and, while they could get the houses if they really wanted them, they would have trouble doing so. This attitude, which we take to be an honest appraisal of the salesmen's sentiments, certainly had an effect on the two men, and upon their willingness and ability to bargain with Thames. In addition, the statements paved the way for Thames' manipulation of the closing costs.

B. One of the government's crucial assertions in this case is that the two black men were required to find other buyers before Thames would pay their closing costs, but white purchasers of Pelzer homes never

paid closing costs. There was uncontradicted evidence in the record that no other buyers of Seth Johnson homes paid closing costs, nor were any white buyers asked to find other buyers. Defendants, however, emphasize that closing costs are an element to be bargained about just like any other aspect of a contract, and that they charged buyers closing costs whenever the market would permit.

This outwardly appealing argument contains two flaws. First, in its advertisements for homes in Montgomery, and in some of its correspondence, Pelzer advertised that it paid closing costs for its customers. Even if this policy were nothing more than a gimmick to attract buyers, the practice of Pelzer in Montgomery was to pay closing costs, and defendants' treatment of Barnett and Marshall was a departure from this practice.

Second, it is apparent from the nature of Pelzer's business that payment of closing costs was not merely a gimmick. Most Pelzer homes were relatively inexpensive, the company doing a large portion of its business with military families. Nearly all Pelzer homes were financed with government loans, either through the Veterans Administration (VA) or the Federal Home Administration (FHA). Such homes must be appraised by a government appraiser. See 12 U. S. C. §1709, 38 U. S. C. §1810. Thus, when a home is financed entirely by one of these loans, the cash price of the home is partially removed from the bargaining, and the question of who pays the closing costs becomes extremely important. For this reason, the payment of closing costs by the realtor in this situation is not

merely a sales gimmick, but a means of price competition.

The district court found that "no white man was ever given the opportunity to save closing costs (including prepaid items), though Thames did, at a later date, advertise that he would waive closing costs on purchase of certain homes." But it appears that the court meant that no white was ever given the opportunity to save closing costs by going out and soliciting other buyers. There was no evidence introduced that any other buyer of a home in Seth Johnson Estates ever had to pay closing costs at all. In fact, two affidavits from white residents of Seth Johnson stated that they did not pay closing costs and that they were not asked by Thames to seek other purchasers.

We find that Thames' demand that Barnett and Marshall find other buyers before they could avoid payment of closing costs was discriminatory treatment, and we find further that this discriminatory treatment was racially motivated. It therefore violated 42 U. S. C. §3604(b). The district court found specifically that "these circumstances would not have occurred in a proposed sale to a white." We agree.

We need not and do not find that racial prejudice dominated Thames' mind during the negotiations. It is enough that race was one significant factor he considered in his dealings with the men. Defendants and their attorney continually reiterated Thames' concern with his financial investment in the unsold houses in Seth Johnson Estates. We do not doubt that his primary goal was to make money, not to violate the Fair Housing Act. But it is not necessary to show that

Thames intended to deprive Barnett and Marshall of rights granted by the Act. A violation occurred because his words had that effect. *United States* v. *Mintzes*, D. Md., 1969, 304 F. Supp. 1305. See also, *Banks* v. *Perk*, N. D. Ohio, 1972, 341 F. Supp. 1175.

C. The district court correctly found that "Thames entered into a ficticious contract to sell the houses" and that "[t]his sham was obviously for the purpose of foreclosing the right of Barnett and Marshall to recontract for one or more of the houses." This finding is repeated verbatim in both the district court's findings of fact and conclusions of law, except that in the conclusions of law the word "fictitious" is replaced with the word "dummy." Either way, we agree.

The court, however, declined to find that this deception was racially motivated and violative of §3604(a) because it might have been carried out "to avoid the necessity of a personal slight to Mr. Marshall or to Mr. Barnett or to avoid possible ill will involved in refusing to sell to Mr. Marshall or Mr. Barnett because they both appeared to be facing credit problems. . . ." The court then adds, "No court should infer bad faith or a bad will when good faith or good will is equally as logical under the circumstances."

With due respect to the district court, we do not feel that good faith or good will is equally logical under the circumstances of this case. Thames and Flanagan had already informed Barnett and Marshall about the trouble they were causing by trying to buy the houses. Thames had already let them know that he wanted them to go out and sell the houses, presumably to other blacks, so that he wouldn't be unable to sell the

rest of the houses to whites after selling two houses to blacks. Thames had already told the men that they had the right to take him to court, but that the resulting suit would be long and costly. No white person was ever forced to go through all these dealings with Thames and Flanagan. We are unable to reach any conclusion other than this: that Barnett and Marshall were treated differently than other Pelzer customers. The sham sales contract and the deceptive sign placed outside the houses fit perfectly into the pattern of discrimination Barnett and Marshall were subjected to, and this court is drawn inexorably to the conclusion that these actions were racially motivated. The placing of "sold" signs in front of the houses in order to foreclose the right of Barnett and Marshall to recontract for the houses violates 42 U. S. C. §3604(a).

In addition to defendants' dealings with Barnett and Marshall, we have also considered the district court's findings with respect to the variations in closing costs between Montgomery and Tuskegee, and with respect to the letters written to prospective customers. We find no error in the district court's findings in these two areas.

IV

Enforcement by the Attorney General

In order to bring an enforcement action under §3613, one of two requirements must be met. One possibility is that the Attorney General must have reasonable cause to believe that a person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by the Fair

Housing Act. The second possibility is that he must have reasonable cause to believe that any group of persons has been denied any of the rights granted by the Act and that such denial raises an issue of general public importance. In his complaint the Attorney General alleged fulfillment of both of these requirements, although only one is required.

The district court, finding that no discrimination existed, never reached the issue of compliance with §3613, except in one sentence of its opinion: "While the government's proof tends to show that this isolated set of circumstances resulted in possible discriminatory treatment of two blacks in seeking to buy houses from Mr. Thames (more properly, from Pelzer Homes, a nondefendant), it has not been proved that such was a part of a pattern or practice of discrimination or that the blacks were prejudiced thereby."

In a case which concerned violation of a different subsection of §3604, a Maryland district court correctly cited *United States* v. *Mayton*, 335 F. 2d 153, 158 (5 Cir., 1964) for the proposition that, "The words *pattern or practice* were not intended to be words of art." *United States* v. *Mintzes, supra,* at 1314. The court went on to note that the Fair Housing Act provided alternative remedies for its violation, and in considering the appropriateness of a remedy under §3613, a court should look to the feasibility of alternative remedies. The court said that "in such a case as this conciliation has little or nothing to work on and a private civil action would be prohibitively expensive for the parties to whom the representations were made, who do not stand to gain or lose any money or property by the outcome of such a suit." *Id.*

This is a similar situation. The Act has been violated. A private suit by Barnett or Marshall would yield nothing to the two men. The Attorney General and his staff have determined that the case is sufficiently important that they have decided to bring their own suit to enforce the provisions of the statute. The case is a good example of the kind of action which should be brought by the government when violations of the Act are brought to its attention.

It is true that a court must exercise independent judgment as to whether the requirements of §3613 are fulfilled before granting relief to the government in a suit such as this one. The Attorney General is not authorized to enjoin any violation of the Fair Housing Act; if he were, the requirements of §3613 would be meaningless. We do feel, however, that a court's standard of review of the Attorney General's decision to bring an action under §3613 should be a limited one. There need not be an actual pattern or practice of resistance or an actual denial that raises an issue of general public importance. The only requirement is that the Attorney General have *reasonable cause* to believe that such conditions exist.

To fulfill the "pattern or practice" requirement, the discriminations must result from more than an isolated or accidental or peculiar event. *United States* v. *West Peachtree Tenth Corp.*, 5 Cir. 1971, 437 F. 2d 221, 227. See *United States* v. *Hunter*, 4 Cir. 1972, 459 F. 2d 205, 217. The government must show that any discriminatory act by the defendants was not an isolated or accidental departure from otherwise nondiscriminatory practices.

Under either of these tests, the defendants' actions in this case qualify as a pattern or practice. The case is not based on a single remark made to Marshall and Barnett during a long series of negotiations. It is not based on an off-hand comment made to a one person on a single occasion. The government's complaint is based on the treatment received by two men over a period of several weeks. Several of the remarks were repeated by different people at different times, and the defendant Thames had plenty of time to reflect on the deal he offered the two men. The record shows that he was, in fact, quite concerned about this transaction. Thames was attentive to what was happening; nothing slipped by him. The treatment received by Barnett and Marshall resulted from the policy of Pelzer Realty Company, as enunciated and implemented by its president, Thames.

In view of our finding that the Attorney General could reasonably have believed that a pattern or practice of discrimination was engaged in, we need not reach the question of whether there was reason to believe that a group of persons had been denied rights guaranteed by the Fair Housing Act.

V

Standard of Review

We are thus forced to conclude that the district court erred in finding that Barnett and Marshall were not discriminated against in their dealings with Thames and Flanagan. In reaching this conclusion, we have used nearly all the findings of fact of the district court as they are presented in its opinion. We have merely

chosen to place different emphasis on some of the facts, which we have described above. In general, we do not disagree with the findings of fact made by the district court. We do, however, feel that the court failed to attribute the proper degree of significance to certain actions of Pelzer Realty Company and its agents.

In considering the government's appeal, we are aware of the fact that the case was submitted to the district court on the pleadings, stipulations and depositions. Nevertheless, we must leave the district court's findings of fact undisturbed unless we find them to be "clearly erroneous." F. R. Civ. P., Rule 52(a). *Volkswagen of America, Inc.* v. *Jahre,* 5 Cir. 1973, 472 F. 2d 557. However, we are able to consider everything that the trial judge was able to consider.

> The appellant's burden, under Fed. R. Civ. P. 52(a), of showing that the trial judge's findings of fact are 'clearly erroneous' is not as heavy as it would be if the case had turned on the credibility of witnesses appearing before the trial judge . . . *Sicula Oceanica, S. A.* v. *Wilmar Marine Eng. & Sales Corp.,* 5 Cir. 1969, 413 F. 2d 1331, 1332.

The only finding of fact of the trial judge which we feel compelled to find clearly erroneous under Rule 52(a) is his finding that the defendants did not refuse to sell the houses to Barnett and Marshall.

> The *Sicula Oceanica* case teaches that it is our duty, when these cases are presented for review, to study the entire record thoroughly and to determine whether we are "left with the definite and firm conviction that a mistake has been commit-

ted." (citation omitted) *Volkswagen of America, Inc.* v. *Jahre, supra.*

In this case, we are left with the definite and firm conviction that the defendants refused to sell the two houses to Barnett and Marshall. In an ordinary situation, a real estate dealer tries to give a customer every opportunity to complete a transaction, consistent with maintaining his investment. He does not put "sold" signs in front of a house before it is really sold. That kind of action is not consistent with common sense or ordinary business practices. To re-emphasize what the district court said in its opinion, "[T]hese circumstances would not have occurred in a proposed sale to a white. . . ."

Conclusion

The relief requested by the government in this case is really very limited. To demand that the defendants stop "discriminating against any person in relation to the sale of a dwelling on account of race, color, religion, or natural origin" is asking nothing more than that they comply with the law as it has been enacted by Congress. The second prong of the relief is nothing more than a demand that the defendants neutralize whatever may have been the effects of their past non-compliance with the Act. Even Mr. Thames testified that he was not sure whether he had discriminated against blacks in the past. We are sure that in this spirit of compromise and reconciliation, the parties and the district court will be able to work out a decree not inconsistent with this opinion.

REVERSED AND REMANDED.

APPENDIX

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 72-1609

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

versus

PELZER REALTY COMPANY, INC., and WILLIAM G. THAMES,

Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Alabama

---

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion Sept. 5, 1973, 5 Cir., 1973, ... F. 2d .....).

(November 19, 1973)

Before COLEMAN, MORGAN and RONEY, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in

regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

C-1

STATE OF ALABAMA
COUNTY OF MONTGOMERY } ss.

AFFIDAVIT
OF
WILLIAM G. THAMES

Before me, Betty S. Stillwaggon, a Notary Public (State of Alabama at Large), hereby certify that on this day before me personally appeared William G. Thames, being first duly sworn, deposes and states as follows:

1. That Pelzer Realty Company ceased to do business in February of 1972 and has done no business since that time. William G. Thames, when Pelzer went out of business, ceased to sell any houses for others or for himself. All sales have been turned over to another realty firm of which he has no connection or interest in nor does Pelzer have any interest.

2. As a matter of fact, the sales people of the new firm are carrying out the same policies that Thames formerly had. They have offered to sell to blacks homes wherever blacks wanted them. These are Thames built houses. One of them was sold to a black across the street from a member of the law firm representing Thames in this case. A good many of them have been sold to blacks in other sections of town and in all price ranges.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 26th day of September, 1973.

William G. Thames L. S.
William G. Thames.

Sworn to and subscribed before me this 26th day of September, 1973.

Betty S. Stillwaggon
Notary Public.

(Notarial Seal)
MY COMMISSION EXPIRES:
October 9, 1976

D-1

IN THE

Supreme Court of the United States

TERM, 19

No. 72-1609

PELZER REALTY COMPANY, INC., AND WILLIAM G. THAMES,

PETITIONERS,

VERSUS

UNITED STATES OF AMERICA,

RESPONDENT,

ORDER

On consideration of the Motion of Appellees for recall and stay of judgment issued as mandate in the above numbered and entitled cause, pending an application for Writ of Certiorari to the United States Supreme Court, it is ordered that the judgment issued as mandate be recalled and stayed to and including January 15, 1974. The stay to continue in force until the final disposition of the case by the Supreme Court provided that within the said period there shall be filed with the Clerk of this Court, the Certificate of the Clerk of the Supreme Court that Certiorari petition has been filed.

It is further ordered that the Clerk shall issue the judgment as mandate upon the filing of a copy of

an order by the Supreme Court denying of the Writ or upon the expiration of the above period unless the Certificate mentioned shall be filed with the Clerk of this Court within that time.

LEWIS R. MORGAN
U. S. Circuit Judge
December 11, 1973